No. 21782 and 21782-A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH J. BYRNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Appeal From the United States District Court,
Central District of California.**

REPLY BRIEF OF APPELLANT BYRNES.

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Preliminary Statement.

By Order of this Court dated December 29, 1967, the Appellant's Opening Brief filed by the Appellant Samuel Reisman is also to be considered in support of the Appeal of Appellant Joseph J. Byrnes. Appellant Byrnes, through his counsel, Earl P. Willens, has read and considered the Appellee's Brief and the Reply Brief of Appellant Samuel Reisman. Appellant Byrnes does hereby adopt *in toto* the Reply Brief of Appellant Reisman and desires this Court to consider said Brief in support of the Appeal of Joseph J. Byrnes.

However, since certain statements contained in Appellee's Brief pertain solely to Byrnes, the same have not been replied to by Appellant Reisman. It is therefore the intention of Appellant Byrnes by the filing of this Reply Brief to supplement the Reisman Brief by pointing out to the Court what Appellant Byrnes considers to be inaccurate references to the record as they pertain to him and to supplement certain of the arguments made by Appellant Reisman as they pertain to the receipt by the Trial Court of "complaint letters." The arguments raised by Appellant Byrnes are indexed under the same subtopical arguments as were used by Appellant Reisman.

ARGUMENT.

I.

THE IMPROPER ADMISSION IN EVIDENCE OF COMPLAINT LETTERS, AND THE COURT'S ERRONEOUS INSTRUCTIONS CONCERNING THE PURPOSE FOR THEIR ADMISSION, CONSTITUTE REVERSIBLE ERROR.

(1) The Court Did Not Make the Necessary Preliminary Determination That Appellant Had Actual, Personal Knowledge of Complaint Letters. (Reisman's Reply Brief pages 4-5.)

(2) The Evidence Is Insufficient to Show That Appellant Byrnes Had Actual, Personal Knowledge of the Complaint Letters.

As in the case of Appellant Reisman, none of the complaint letters were addressed to Byrnes. There is no evidence that any of the complaint letters received in evidence were seen by him. The Government does not and cannot point to one shred of evidence in the record to support its claim: "the evidence that Appellants had personal knowledge of complaints is overwhelming and undisputed." (Govt. Br. p. 52).

The Government makes no attempt to tie a specific complaint letter to Byrnes in terms of Byrnes actually viewing such letter. Rather, the Government attempts the "broad brush" approach rejected in the *Phillips* case (*Phillips v. United States,* 356 F. 2d 297 (9th Cir. 1965)). Even at that, the Government distorts the testimony concerning complaint letters in its attempt to connect Byrnes. For example, the government says that Company policy dictated that Rockel (a general manager), after making an initial determination con-

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cerning a complaining customer, would then automatically discuss the complaint with Reisman, Benaron and Byrnes (Gov't Br. p. 53). Such is not the state of the record. Rockel testified that upon receiving a complaint he would talk to the complaining customer and the sales person involved and would at times discuss the situation with the sales manager. He stated that from time to time he would discuss a complaint with Benaron and Reisman or other principals in the Company [R. T. 5504-5508]. There is *no* attempt by the Government to tie any specific complaint so reviewed by Mr. Rockel and possibly discussed with a principal in the Company with any of the hundreds of complaint letters received in evidence.

The next attempt by the Government to tie Byrnes, personally, into any complaint letters is the statement that "Byrnes was also advised of purchaser complaints of misrepresentation", citing the testimony of Mr. Stein in support thereof (Gov't Br. pp. 53-54). The fact that such an assertion is typical of the Government's over-reaching, both in its brief and in its conduct during the course of the long trial below, is graphically demonstrated when one analyzes the testimony relied upon by the Government to support its assertion. While Mr. Stein was on the stand, the Prosecutor offered Government Exhibit 3-397, a refund file which the Court admitted, as it had been doing throughout the entire trial, simply because it was a record of Gamble Ranch [R. T. 4813-4814]. This file contained, among numerous papers, a letter from the manager of the San Diego office of Gamble Ranch to Mr. Stein. Therein the manager stated that since he had saved a sale, he wanted the sales-commission instead of giving it to the

original salesman involved. He instructed Stein to so advise Byrnes. The following colloquy took place between the Prosecutor and Mr. Stein:

> "Q. [Mr. Nissen] Mr. Stein, did you let Mr. Byrnes know about that?" [The letter from San Diego]. "A. [The Witness] I assume I did. I know that I passed it on. I don't know if I passed it directly to Mr. Byrnes or to Mr. Rockel. Who ever was in charge at the time, I would pass it on to.
>
> It says here 'Let Mr. Byrnes know about this'. I don't know whether I would have brought it directly to him or not.
>
> Q. You don't recall it at this stage? A. No, I just don't today sir, I am sorry." [R. T. 4813-4814].

Byrnes himself denied ever seeing the memorandum [R. T. 12871]. Thus even the Government's search of the transcript comes up with nothing better to connect Byrnes with any knowledge of complaints in general than testimony which equally supports the inference that Byrnes never heard of the entire episode referred to in Exhibit 3-397.

Appellant Reisman attacks a smiilar weakness in the Government's position when he refers to the Government's attempt to show that Reisman had personal knowledge of complaints because he "kept in touch" with Nevada attorney McDonald (Reisman's Reply Br. pp. 6-7). This same artifice is attempted by the Government against Byrnes, and Reisman's statements relating thereto are equally applicable to Byrnes.

Further, the Government claims that Byrnes had personal knowledge of complaints because copies of attor-

ney Ross' letters in response to complaint letters were available to Byrnes in the Company office (Gov't Br. p. 54). The *Phillips* case disposes of this argument when it rejected the "availability" evidence as being insufficient to impute knowledge. One need only consider the tens of thousands of pieces of paper introduced into evidence as being "the records of Gamble Ranch" to appreciate the absurdity of arguing that Byrnes or Reisman would have knowledge of an individual piece of paper solely because it reposed in one of several filing cabinets in the Gamble Ranch office.

Not content with this availability argument, the Government goes on to insinuate that Byrnes was aware of complaint letters because attorney Ross' letters to complainers contained information which Ross obtained from Byrnes (Gov't Br. p. 54). The Government conveniently ignores the following testimony offered by Mr. Ross: ". . . as far as Mr. Byrnes having anything to do with these refund letters, he didn't have anything to do with them. He may have been the source of some specific information in the office I wanted." [R. T. 11648]. In fact, this specific information did not relate to any particular refund or complaint letter but was just information about the Ranch in general [R. T. 11650-11651].

In conclusion, the Government ignores the facts in the record when it argues that Byrnes had actual personal knowledge of all the complaint letters admitted against him. The Government's brief discloses no letter personally reviewed by Byrnes nor any which Byrnes personally had knowledge. The admission of these hundreds of letters against Byrnes is so prejudicial as to require reversal.

(3) The Court's Erroneous Instructions Regarding Complaint Letters Require Reversal. (See Reisman Reply Brief pages 9-14.)

Reisman's opening and reply briefs correctly point out that the Government offered complaint letters for one purpose only: to prove that someone in the Company knew of the complaints and that therefore the defendants had criminal intent (See Reisman's Opening Brief pages 29-36; Reply Brief pages 9-14). In addition to the record referred to by Reisman demonstrating the Prosecutor's position, which was re-emphasized throughout the trial, Byrnes notes the following colloquys between the Court and Prosecutor during the Prosecutor's case:

> "Mr. Nissen: We have a case that says the complaints brought to the attention of defendants are admissible for certain purposes.
>
> The Court: There is no question about that. No question about that.
>
> Mr. Nissen: *Bearing on the question of good faith.*
>
> The Court: No question about that." [R. T. 5839] (Emphasis added).

And later, the Court, at the conclusion of the government's case, questioned the Prosecutor about his use of complaint letters. The Prosecutor in order to reassure the Court and to reemphasize to the jury the purpose for which these letters were offered, stated:

> But the files are the cancellation or complaint or whatever you want to call them.
>
> The Court: What are you offering them for?

Mr. Nissen: The complaint letters are offered with the purpose of showing these matters were brought to the *Company's attention.* The answers of the Company—(emphasis added)

. . .

The Court: Any complaint letters, when the witness is not on the stand, and will not take the stand are offered only to show that information came to the attention of the Company.

Mr. Nissen: Yes sir.

The Court: Just so the jury understands." [R. T. 9050].

Thus the purpose of the Government's use of these letters was made crystal clear both to the Court and to the jury. They were used solely in an attempt to prove criminal intent through constructive receipt of the complaint letters. A practice condemned by this Court in the *Phillips* case.

(4) Appellant Repeatedly Objected to Complaint Letters Offered in Evidence (Reisman's Reply Brief pp. 14-20.)

Byrnes commenced objecting to the carload amounts of paper being placed in evidence by the prosecutor almost from the very day the trial began. But right from the trial's start the Court was not interested in Byrnes objections so long as the prosecutor established that the paper was from Gamble Ranch files [R. T. 979].

On the second or third trial day the Court after Byrnes had again objected to the relevance of these papers questioned Nissen, who replied:

". . . they all have relevance to a degree and to sort them out and take them apart . . .

(The Court) What do you mean they all have relevance to a degree?

Nissen: They do, they all have relevance. All of these documents are company files of the Gamble Ranch" [R. T. 1195].

Upon such an explanation, the Court admitted the document under consideration where the objection was made, and thousands more for the same reason.

The Government was permitted to establish its case against Byrnes without following the basic evidentiary rules of relevancy, materiality or hearsay. Of the thousands of documents received in evidence, perhaps ten per-cent would be properly admitted if the court had correctly applied the Business Records Exception (28 U.S.C. §1732). Once the crack in the door occurred, Byrnes was helpless to avoid the flood of documents. Further objection was futile. Byrnes objections, however, and those of the other defendants preserved their right to have this Court review the objections and the prejudicial error which resulted.

(5) The Erroneous Admission of Complaint Letters and the Court's Instructions Concerning the Purpose of Their Admission Constituted Plain Error.

Appellant Reisman's Reply Brief cites the pertinent authority for the proposition that, although the Appellants may not have precisely framed objections to the "complaint evidence," where the admission of such evidence amounts to an unfair trial, this Court will consider the propriety of the admission of such evidence (Reisman's Reply Brief, pp. 20-28).

And, while Appellant Reisman's Opening Brief, adopted by Appellant Byrnes, makes several references to the complaint letters admitted and does quote from portions thereof (Appellant's Opening Brief, pages 23; 38-42; Appendices A and C), the tactic of the Prosecutor in his use of these complaint letters cannot be overemphasized. The tactic was deliberate, diabolical and effective. This was not a case where the Prosecutor selected a few files at random and quoted therefrom to a jury. Rather, the Prosecutor laid a very clever path with these complaint letters calculated to incite the jury's wrath against Byrnes throughout the almost two months the Prosecutor presented his case.

The trial was not two days old when the Prosecutor began laying the groundwork for his use of complaint letters. He began by introducing Gamble Ranch files in wholesale lots on the theory that such were relevant as being Company files of the Gamble Ranch [R. T. 1195]. The files were offered and read, sometimes with reference to a witness on the stand [R. T. 4813-4814], but more often not [R. T. 5890-5891; 9041-9071].

In order to portray the highly prejudicial effect on the trial through such use of the complaint letters by the Prosecutor, it is necessary to amplify on the prosecutor's use of such letters. This use is most graphic at the very closing stages of the Prosecutor's case when on May 27, 1965, after seven weeks of testimony, after thousands of Exhibits had been received in evidence, and after the pattern for the admissibility of complaint letters had long been established. the Prosecutor advises the Court of his intention to read from several complaint letters. These complaint letters were from per-

sons not present in Court, nor had they previously been called as witnesses by the Prosecution; and their introduction rested solely upon the business records exception without a preliminary finding by the Court that Byrnes or any of the defendants had personal knowledge of these letters.

Preliminary to his reading of these letters the prosecutor states to the Court that he has some matters to read, that he would follow the procedure of merely stating the number of the file, representing to the Court that the files were Gamble Ranch files. The Court, upon having advised that they were complaints that came from the Gamble Ranch file, admitted them in evidence based solely on their having come from said Gamble Ranch files [R. T. 6049-6050].

Mr. Nissen then proceeds to read complaints of misrepresentation by various purchasers. In connection with each such complaint he reads the answer of Bert Ross, who was an independent attorney hired by the Company to process these complaints (See appellant Reisman's Opening Br. pp. 24-26). Ross, in some cases, agreed to a refund and in other cases he would write the purchaser and state that there was no refund due. The complaints in certain instances were similar and the Prosecutor was obviously asking the jury to infer that Ross had no particular standard for making any refund [R. T. pp. 9051-9057 and Exs. 3-1793; 3-1797; 3-1826; 3-1833]. Byrnes had no actual knowledge of either the complaint or the answer sent by Ross.

After reading the above series, Nissen then picks Exhibit 3-1836, a letter of October 31, 1962 suit from John Carey to Bert Ross, asking Ross to hold down cash refunds. There was no showing that Byrnes

had any knowledge that this letter was sent nor was there any evidence that it was sent pursuant to Byrnes' directions. Immediately after reading the aforesaid letter the Prosecutor then reads a letter from Ross to a purchaser dated November 13, 1962 where Ross rejects the request for refund [R. T. 9057-9058]. Apparently the inference that the Prosecutor wanted the jury to draw was that Ross was not acting independently but was now rejecting a refund request pursuant to the letter from Mr. Carey.

The Prosecutor's approach is further exemplified when he reads from Exhibit 3-1890 containing a letter of October 24, 1962 from a purchaser to an employee of Gamble Ranch living *at the Ranch* stating that various representations made by a saleslady were false. Neither the complaining witness nor the saleslady was ever called as witnesses for the Prosecution.

Although the defense knew the Court's disposition to allow this type of presentation, its obvious and damaging effect prompted the defendants to once again object to this type of procedure and the admission of this evidence. The Court however only noted for the record the continuing general objection made by the defendants to this type of procedure [R. T. 9063-9064].

Byrnes had been basing his defense upon his own good faith. The public report of the Division of Real Estate of the State of California, which was required to be shown to each purchaser at the time of signing a land contract, and which described the land being sold, was an important element in establishing the defendants' good faith. Knowing this, on several previous occasions, the Prosecutor attempted to demonstrate with witnesses present in Court that a pur-

chaser was not given a public report to sign at the time the land contract was signed. On cross-examination many witnesses who had denied receiving a public report during their direct examination by the Prosecutor, admitted they must have received same when the document was found in their file dated the same day as the land contract.

Now, the Prosecutor having received a green light to proceed, takes a more effective and safe approach and reads excerpts from a letter of July 15, 1962, where a purchaser complained that he had been making payments and would soon be a titleholder, and then the complainant states: "In the meantime we have received the final subdivision public report" . . . [R. T. p. 9064]. Nissen stopped reading from the letter at that point leaving the jury to infer that the public report was not sent for a considerable period of time until after the purchase. The Prosecutor knew that the defense would have no way of cross-examining the witness; would have no way of establishing just when the public report was signed; would have no way of establishing whether the purchaser had received a copy of the public report at the time of executing the land purchase agreement; would have no way of testing the complainant's memory.

Knowing all of the above, and knowing the impression he must have just left with the jury, the Prosecutor then immediately picks out a letter of December 7, 1961, from another file where the purchaser complained that he did not get a subdivision report until after it was signed [R. T. 9064; Ex. 3-714]. Obviously the Prosecutor did not pull these two files out by mere coincidence; particularly since the only portion

he reads from Exhibit 3-714 is the statement that a public report was not received until after the contract was signed.

The Prosecutor continues this tactic and after reading from several files where the question of the public report is raised. concludes with the gratuitous comment to the jury after reading from Exhibit 3-1276 where an attorney writes to the Company that his clients never got a report: "As I examine the file, I might say, there is no public report in the file." [R. T. 9066-9069].

A reference to the transcript discloses that in effect, the Prosecutor is rebutting Byrnes' showing of good faith in the use of the public report not by calling witnesses but by reading from complaint letters. Byrnes is deprived of knowing any of the background concerning any of these complaint letters; deprived of cross-examination; deprived of explaining to the jury the reason that a public report may or may not have been sent in a particular instance.

For almost an entire morning session the Prosecutor continued with the above stated approach. After the morning recess the Prosecutor continued by reading selected excerpts from a rather lengthy complaint letter contained in Exhibit 3-1259. The Prosecutor read:

> "You see, I am past my seventy-sixth birthday and I thought that for an investment I could realize a profit on it, but when I found nothing on the Ranch but sagebrush, one ranch house and one patch of alfalfa, I knew that I was born too soon to wait on the development of this project." [R. T. 9073].

One questions the Prosecutor's motive for this cumulative comment about sagebrush, a description that

the jury had been hearing from Government witnesses for approximately six weeks, unless it was his purpose to further inflame the jury by making reference to the fact that a salesman not on trial, sold this type of property as an investment to a seventy-six year old man.

After continuing with this approach through the reading of selected excerpts from several other files, the prosecutor finally concludes by reading excerpts from a letter contained in Exhibit 3-1564 as follows:

> "Just a note. On my vacation I went up to the Ranch and was never so disapppinted by anything in my life. I can't see why its so 'world-famous' unless its for being so desolate and hidden away. Montello, oh! Its worse than a peasant village in old Mexico. Why don't somebody clean Montello up. I never seen so much trash and junk. Make a decent looking western town will you? I'll tell you truly I feel I have been cheated . . . ". . . I'll tell you it discouraged me and made me sorry I bought for there was 'great misrepresentation'. Don't you ever have a rain up there?"

Nissen then concludes by commenting "there are two other pages to the letter." [R. T. 9083-9084].

What was the purpose of Nissen reading that letter as his last? Certainly it was not to acquaint the jury with any new information. Certainly it was not to show that this information was transmitted to Byrnes, since this letter, like all of the other letters read, was in no way connected with Byrnes or any of these defendants except that it appeared in the Gamble Ranch file. What indeed, unless it was a part of a tactic to arouse the sympathies of the jury and prevent an ob-

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jective appraisal of the testimony of the Prosecution's concluding witness, the postal inspector who investigated the case and who was about to testify to conversations which he had with each of the defendants', conversations wherein they claimed that it was not their intention to misrepresent the property at any time, and where they stated they relied upon the information contained in the public report and upon experts.

Consequently, when one views the entire Government's case, it is clear that this case is held together by testimony calculated more for its ability to incite anger or prejudice against Byrnes than for its probative value.

Conclusion.

For the reasons as set out in appellant Reisman's Opening and Reply Briefs, and the forgoing reasons, the judgment of conviction should be reversed.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

EARL P. WILLENS